

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2390

Cir. Ct. No. 2012TP9

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO JERAMIHA H., A PERSON
UNDER THE AGE OF 18:**

BARRON COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TARA H.,

RESPONDENT-APPELLANT,

ROBERT S.,

RESPONDENT.

APPEAL from an order of the circuit court for Barron County:
JAMES D. BABBITT, Judge. *Reversed and cause remanded with directions.*

¶1 HOOVER, P.J.¹ Tara H. appeals an order terminating her parental rights to her son, Jeramiha H. Tara argues the circuit court erroneously exercised its discretion by determining termination was in Jeramiha's best interests. We agree and reverse and remand with directions.

BACKGROUND

¶2 On February 7, 2012, the Barron County Department of Health and Human Services petitioned to terminate Tara's parental rights to Jeramiha. The petition alleged that Tara had failed to assume parental responsibility.² Tara contested the petition, and the court held a jury trial.

¶3 At trial, county social worker Hope Larsen testified that Jeramiha was born to Tara and Robert S. on May 5, 2008, and that Jeramiha lived with Tara. Larsen testified the County first became involved with Jeramiha in May 2010, after he had been found wandering outside by himself while in his maternal grandmother's care. Larsen stated that she met with Tara to discuss appropriate caregivers for Jeramiha while Tara was at work.

¶4 On August 26, 2010, the County received a report that Jeramiha was "bruised from head to toe." Larsen picked Tara up from work, and when Larsen, Tara, and a police officer arrived at Tara's residence, Larsen observed that Jeramiha was visibly bruised, quivering, and looked lifeless. An ambulance was

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² The petition also sought to terminate the parental rights of Jeramiha's father, Robert S. Robert is not the subject of this appeal.

called and Jeramiha was taken to a local hospital. He was ultimately airlifted to Children's Hospital in Minnesota.

¶5 Jeramiha suffered serious injuries, including bruising of his brain, his forehead, both ears, the back of his head, his chest, his abdomen, his genitalia, and his legs. He also had two rib fractures, a punctured lung, a lacerated liver, and injury to his kidneys. Tara told Larsen and the police officer that a friend had watched Jeramiha the day before and told Tara that Jeramiha injured himself by jumping off a slide. Doctor Mark Hudson, Jeramiha's treating physician at Children's Hospital, opined that Jeramiha's injuries were not consistent with an injury suffered from a fall and he believed Jeramiha had been "beaten severely."

¶6 Jeramiha was removed from Tara's care that day. He was subsequently found to be a child in need of protection or services (CHIPS) based on Tara's admission to neglect—that she should have sought medical attention for Jeramiha. Tara also pled guilty to misdemeanor neglect for failing to take Jeramiha to a doctor. There was no allegation that Tara abused Jeramiha.

¶7 Larsen testified that, following the entry of the CHIPS order, Tara participated in the programs offered to her and, although she was cooperative with the department, she "wasn't able to meet the goals of those services." Tara, however, consistently attended supervised visits with Jeramiha. Further, the county employee who supervised some of the visits testified that Jeramiha was excited to see Tara and "[h]e would run to her. He would talk to her, [and] give her a hug." He also called Tara "mom."

¶8 The jury found that Tara failed to assume parental responsibility for Jeramiha. Based on the jury's determination, the court found Tara was an unfit parent and scheduled a dispositional hearing.

¶9 Before the dispositional hearing, a county social worker submitted a report to the court that opined it was in Jeramiha's best interests for the court to terminate Tara's parental rights. The report noted, among other things, that Jeramiha's foster parents, who were Tara's first cousin and his wife, were interested in adopting Jeramiha, that Jeramiha had formed a "healthy and significant bond" with his foster parents, that he had "made a great deal of progress in all developmental areas" since his placement, and that, although he had a relationship with Tara and was excited to see her during visits, Jeramiha was not sad to return to his foster parents after a visit and never asked for Tara.

¶10 At the dispositional hearing, the County and Jeramiha's guardian ad litem argued it was in Jeramiha's best interests for the court to terminate Tara's parental rights. Tara asked the court to dismiss the petition or, in the alternative, dismiss the petition and order a guardianship for Jeramiha.

¶11 The court terminated Tara's parental rights, reasoning:

The standard today is clearly the best interests of Jeramiha. I'm to consider a number of factors in making a determination as to what's in Jeramiha's best interests: The likelihood of adopting, his age and his health and his age and his health when he was removed from his home, whether he's had a substantial relationship with the parent or other family members, obviously I can't consider his wishes, the duration of the separation of the parent from the child, and whether the child will be able to enter a more stable and permanent family relationship with the granting of the TPR, which reiterates the first criteria that I put on the record, the likelihood of adoption, and future placements, and the conditions of his current placement.

The jury verdicts finding that there are grounds for termination of parental rights were firmly grounded on the facts. They are supported by the evidence amply, in this

Court’s opinion, and they are affirmed.^[3] [The guardian ad litem] speaks to the best interest of her client and the need that every child has for some sort of stability now and in the future. I thought [the County]’s vernacular version of ... he shouldn’t have to wait around while his parents get their act together was pretty plain speaking and sums up Jeramiha’s situation and, in this Court’s opinion, adequately—he adequately sums up [why] the alternative is not in Jeramiha’s best interest. He has been dealt some not very good cards so far in his life, now we need to carry the analogy further, reshuffle the deck and see if we can get him some face cards in the next hand he’s going to get.

I’ve considered the criteria. I find that he is adoptable. I find that for virtually half of his life he’s been placed out of his home. And the jury spoke to the relationship or substantial parental relationship he’s had with both parents. The fact remains that with respect to [Robert], the father, the contact was barely there. And they found the abandonment ground based on that. I am, by whatever standard I need, clear, satisfactory, and convincing is the one I’ll use, but even if I had to make the finding beyond a reasonable doubt, I would so find that it is in Jeramiha’s best interest to grant the termination of ... the parental rights of both [Tara] and [Robert].

DISCUSSION

¶12 The procedure for involuntary termination of parental rights is a two-step process. *Sheboygan Cnty. DHHS v. Julie A.B.*, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. During the first or “grounds” phase, the fact-finder determines whether one of the statutory grounds exist to terminate a parent’s rights. *Id.*, ¶26. If a ground is established, the parent is found unfit and the proceeding moves to the second phase, or dispositional hearing. *Id.*, ¶¶26, 28.

¶13 On appeal, Tara challenges only the dispositional hearing. At a dispositional hearing, the circuit court determines whether it is in the child’s best

³ In addition to finding that Tara had failed to assume parental responsibility, the jury found that Robert had abandoned and failed to assume parental responsibility for Jeramiha.

interests to terminate the parent's rights. *Id.*, ¶28. This determination is within the circuit court's discretion. *Brandon S.S. v. Laura S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). However, when exercising its discretion, the circuit court *must* consider the six factors enumerated in WIS. STAT. § 48.426(3) on the record. *Julie A.B.*, 255 Wis. 2d 170, ¶29. Specifically, the court must consider:

- (a) The likelihood of the child's adoption after termination.
- (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
- (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
- (d) The wishes of the child.
- (e) The duration of the separation of the parent from the child.
- (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

WIS. STAT. § 48.426(3).

¶14 Tara asserts the circuit court erroneously exercised its discretion because it failed to adequately consider the WIS. STAT. § 48.426(3)(c) factor—whether Jeramiha had a substantial relationship with Tara or other family members, and whether it would be harmful to sever those relationships. Tara argues the circuit court erred because its consideration of the § 48.426(3)(c) factor consisted of nothing more than its belief that the evidence supported the jury's verdict that she failed to assume parental responsibility. She argues that the failure to assume parental responsibility ground and the § 48.426(3)(c) factor are not

synonymous, and, irrespective of whether the fact-finder determined she failed to assume parental responsibility, the court still needed, but failed, to consider Jeramiha's relationship with her and her family and whether severing those relationships would be harmful.

¶15 The County responds that the court gave adequate consideration to the WIS. STAT. § 48.426(3)(c) factor. The County points out that the failure to assume parental responsibility ground is established by proving the parent did not have a "substantial parental relationship" with the child. WIS. STAT. § 48.415(6)(a). It argues the court's agreement with the jury's determination that Tara lacked a substantial parental relationship sufficiently satisfied § 48.426(3)(c)'s requirement that the court consider whether Jeramiha had a substantial relationship with Tara.

¶16 We, however, conclude that a court's determination that a parent lacked a "substantial *parental* relationship" with the child, as used in WIS. STAT. § 48.415(6), does not excuse the court from considering whether the child has a substantial relationship with the parent. After all, our supreme court has stated that, when considering whether the child has a substantial relationship, WIS. STAT. § 48.426(3)(c) "unambiguously require[s] that a circuit court evaluate the effect of a legal severance on the broader relationships existing between a child and the child's birth family. These relationships encompass emotional and psychological bonds fostered between the child and the family." *State v. Margaret H.*, 2000 WI 48, ¶21, 237 Wis. 2d 606, 610 N.W.2d 475. However, in the grounds phase, when determining whether a parent has a "substantial parental relationship" with a child, no consideration is given to any emotional and psychological bond that the child may have with the parent. *See* WIS. STAT. § 48.415(6). Instead, "substantial parental relationship," as used in § 48.415(6), is defined as "the acceptance and

exercise of significant responsibility for the daily supervision, education, protection and care of the child.” We agree with Tara that, even if the court determined the evidence showed a parent failed to assume parental responsibility because the parent lacked a “substantial *parental* relationship” with the child, the court must still consider whether the child has any substantial emotional or psychological bond with the parent at the dispositional hearing.

¶17 Further, even if we were to assume that Tara’s lack of a parental relationship with Jeramiha automatically established that he, in turn, did not have a substantial relationship with her, the circuit court still failed to consider Jeramiha’s relationship with his other birth family members and it never considered whether it would be harmful to Jeramiha to sever those relationships. *See* WIS. STAT. § 48.426(3)(c). The County does not refute Tara’s contention that the court failed to make these considerations. Instead, it suggests that the court was not required to consider any relationship Jeramiha had with Tara’s family members or whether Jeramiha would be harmed by serving these relationships because Tara did not introduce evidence establishing an emotional connection between Jeramiha and her family members and she did not introduce evidence showing that Jeramiha would be harmed by severing his relationships with her or her family.

¶18 We disagree with the County that the record is completely lacking in these areas. The record shows that Tara’s mother used to babysit Jeramiha and Tara’s sister used to supervise Tara’s visits with him. Additionally, the dispositional report filed by the county social worker stated that Jeramiha had a relationship with Tara and was excited to see her during visits. In *Margaret H.*, 237 Wis. 2d 606, ¶35, our supreme court stated that “the record should reflect *adequate consideration of* and weight to *each* factor” listed in WIS. STAT. § 48.426(3). (Emphasis added.) Nothing in the record reflects that the court

considered the entirety of the WIS. STAT. § 48.426(3)(c) factor. We conclude the circuit court erroneously exercised its discretion by failing to give proper consideration to that factor.

¶19 The County next argues that if we conclude the court erred by failing to properly consider the WIS. STAT. § 48.426(3)(c) factor, we should determine the error was harmless based on the court’s consideration of the other factors listed in § 48.426(3) and the entirety of the record. However, in *Margaret H.*, after determining the circuit court erroneously exercised its discretion by failing to properly consider all of the § 48.426(3) factors, our supreme court declined the state’s request to conclude termination was in the children’s best interests without remanding to the circuit court. *Margaret H.*, 237 Wis. 2d 606, ¶¶36, 38.

¶20 The *Margaret H.* court observed that when faced with inadequate findings, an appellate court may:

- 1) Look to an available memorandum for findings and conclusions; 2) review the record anew and affirm if a preponderance of evidence clearly supports the judgment; 3) reverse if the judgment is not so supported; or 4) remand for further findings and conclusions.

Id., ¶37. However, the court stated that it has “expressed a preference for remanding to the circuit court when confronted with inadequate findings, particular in family law or domestic relations actions.” *Id.*, ¶38. The court noted that “[a]n examination of the record is seldom adequate to render factual determinations that lie squarely within the province of the circuit court.” *Id.* As a result, the *Margaret H.* court remanded the matter to the circuit court for a proper consideration of the WIS. STAT. § 48.426(3) factors. *Margaret H.*, 237 Wis. 2d 606, ¶40.

¶21 In this case, whether Jeramiha has a substantial relationship with Tara or his birth family members, and whether the severance of those relationships would be harmful to Jeramiha requires an examination of the record and factual findings. Similar to the court in *Margaret H.*, we decline the County's request to conclude termination of Tara's parental rights was in Jeramiha's best interests based on the record. We therefore reverse and remand to the circuit court for a dispositional hearing. At the dispositional hearing, the court must consider all the factors enumerated in WIS. STAT. § 48.426(3), including subsection (c), to determine whether it is in Jeramiha's best interests to terminate Tara's parental rights.⁴

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁴ The court need not hear the same evidence again, but it may receive additional facts as necessary.

